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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 DEVON ANTHONY BENNETT,) NO. CV 11-7423-E
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DEVON ANTHONY BENNETT,
Petitioner,
v.
STATE OF CALIFORNIA,
Respondent.

ORDER DISMISSING PETITION
WITHOUT PREJUDICE

18 PROCEEDINGS

19
20 Petitioner filed a "Petition for Writ of Habeas Corpus By a
21 Person in State Custody" on September 9, 2011. Petitioner also filed
22 an "Election Regarding Consent to Proceed Before a United States
23 Magistrate Judge." Respondent filed an Answer on December 30, 2011,
24 asserting: (1) the Court lacks jurisdiction because Petitioner
25 allegedly failed to name as Respondent the person having custody over
26 Petitioner; (2) the Court lacks jurisdiction because Petitioner
27 allegedly is no longer in state custody; and (3) the Petition is
28 unexhausted. On January 5, 2012, Respondent filed a "Consent to

1 Proceed Before a United States Magistrate Judge (State/Federal Habeas
2 Case)." On January 13, 2012, Petitioner filed a "Response to the
3 State of California Memorandum, etc.," constituting Petitioner's Reply
4 ("Reply").

5
6 **BACKGROUND**
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8 A jury found Petitioner guilty of transportation of marijuana in
9 violation of California Health and Safety Code section 11360(a)
10 (Clerk's Transcript 78, 84). On August 10, 2009, Petitioner received
11 a sentence of three years (Reporter's Transcript 528-29; Clerk's
12 Transcript 90-92). The sentencing court advised Petitioner that:
13 (1) Petitioner was required to register as a narcotics offender;¹ and
14 (2) following service of the sentence, Petitioner would be subject to
15 a three-year parole period (Reporter's Transcript 528-29).

16
17 The California Court of Appeal affirmed the judgment
18 (Respondent's Lodgment 6; see People v. Bennett, 2010 WL 2406408 (Cal.
19 App. June 17, 2010)). The California Supreme Court denied
20 Petitioner's petition for review summarily (Respondent's Lodgments 7,
21 8). Petitioner filed a habeas corpus petition in the Los Angeles
22 County Superior Court on October 8, 2010, which that court denied in a
23 written order on November 3, 2010 (Respondent's Lodgments 8, 10).
24 Petitioner has not yet filed any habeas corpus petition in the

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¹ See Cal. Health & Safety Code § 11590.

California Supreme Court.²

PETITIONER'S CONTENTIONS

Petitioner contends:

1. Delay in bringing Petitioner to trial assertedly violated Due Process and the Sixth Amendment; and

2. The prosecution's main witnesses allegedly committed perjury.

DISCUSSION

I. Jurisdictional Issues

"A petitioner for habeas corpus relief must name the state officer having custody of him or her as the respondent to the petition." Stanley v. California Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994); 28 U.S.C. § 2242 (habeas petition must name "the person who has custody over [the petitioner]"); Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996); see Rule 2(a), Rules Governing Section 2254 Cases in the United States District Courts. The failure to name

² The Court takes judicial notice of the California Supreme Court's docket available at www.courts.ca.gov, which does not reflect that any person named Devon Bennett has ever filed any habeas corpus petition in that court. See Mir v. Little Company of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988) (court may take judicial notice of court records).

1 the proper respondent deprives the Court of personal jurisdiction.
2 Smith v. Idaho, 392 F.3d 350, 352-55 (9th Cir. 2004). "[W]hen a
3 habeas petitioner has failed to name the proper respondent pursuant to
4 § 2242 [the Court] must ask *sua sponte* whether the respondent who *is*
5 named has the power to order the petitioner's release." Id. at 355
6 n.3 (original emphasis). "If not, the court may not grant effective
7 relief, and thus should not hear the case unless the petition is
8 amended to name a respondent who can grant the desired relief." Id.

9
10 Respondent contends, and Petitioner does not dispute, that at the
11 time Petitioner filed the Petition Petitioner was (and remains) a
12 detainee in the physical custody of United States Immigration and
13 Customs Enforcement. Petitioner contends, however, that he also was
14 (and remains) a parolee with respect to the challenged conviction (see
15 Reply, p. 3). A federal habeas petitioner on parole at the time of
16 filing the federal petition may name as the respondent the
17 petitioner's probation or parole officer "and the official in charge
18 of the parole or probation agency, or the state correctional agency,
19 as appropriate." Ortiz-Sandoval v. Gomez, 81 F.3d at 894 (9th Cir.
20 1996) (quoting 1976 Advisory Committee Note to Rule 2; internal
21 quotations omitted). Petitioner has not named the proper Respondent.
22 Respondent "People of the State of California" is not Petitioner's
23 parole officer or the parole agency having legal control over
24 Petitioner with respect to the challenged custody. Ordinarily, the
25 Court would consider whether to permit Petitioner to amend the
26 Petition to name a proper respondent. However, as discussed in
27 section II below, the Court must dismiss the Petition as completely
28 unexhausted.

1 Respondent also raises the jurisdictional issue of whether
2 Petitioner was "in custody" within the meaning of 28 U.S.C. section
3 2254(a) at the time Petitioner filed the Petition. Subject matter
4 jurisdiction over habeas petitions exists only where, at the time the
5 petition is filed, the petitioner is "in custody" under the conviction
6 challenged in the petition. Maleng v. Cook, 490 U.S. 488, 490-91
7 (1989); 28 U.S.C. §§ 2241(c), 2254(a). Respondent cites Resendiz v.
8 Kovensky, 416 F.3d 952 (9th Cir.), cert. denied, 546 U.S. 1043 (2005),
9 for the proposition that an immigration detainee facing deportation on
10 the basis of a state conviction is not in state custody for purposes
11 of section 2254. In Resendiz, the petitioner's 1997 state sentence of
12 180 days and three years' probation had fully expired before the
13 petitioner filed the federal habeas petition. See, id. at 955. By
14 contrast, assuming the truth of Petitioner's allegation that he has
15 been on parole, Petitioner was in state "custody" within the meaning
16 of section 2254 when he filed the present Petition. See Jones v.
17 Cunningham, 371 U.S. 236, 243 (1963) (parolee is "in custody" for
18 purposes of federal habeas jurisdiction); Cal. Penal Code § 3056
19 ("Prisoners on parole shall remain under the legal custody of the
20 department and shall be subject at any time to be taken back within
21 the inclosure of the prison.").³ Therefore, the Court does not lack
22 subject matter jurisdiction to adjudicate the Petition.

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27 ³ However, there is no merit to Petitioner's contention
28 that he is "in custody" by reason of a narcotics offender
registration requirement. See Resendiz v. Kovensky, 416 F.3d at
958-59.

1 **II. Exhaustion Issues**

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3 A federal court will not grant a state prisoner's petition for
4 writ of habeas corpus unless it appears that the prisoner has
5 exhausted available state remedies. 28 U.S.C. § 2254(b) - (c);
6 Baldwin v. Reese, 541 U.S. 27, 29 (2004); O'Sullivan v. Boerckel, 526
7 U.S. 838, 842 (1999). "Comity thus dictates that when a prisoner
8 alleges that his continued confinement for a state court conviction
9 violates federal law, the state courts should have the first
10 opportunity to review this claim and provide any necessary relief."
11 O'Sullivan v. Boerckel, 526 U.S. at 844. The exhaustion requirement
12 seeks to avoid "the unseemliness of a federal district court's
13 overturning a state court conviction without the state courts having
14 had an opportunity to correct the constitutional violation in the
15 first instance." Id. at 844-45 (citations, internal brackets and
16 quotations omitted). Exhaustion is considered on a "claim-by-claim"
17 basis. Insyxiengmay v. Morgan, 403 F.3d 657, 667 (9th Cir. 2005).
18

19 State remedies have not been exhausted unless and until the
20 petitioner's federal claims have been fairly presented to the state's
21 highest court. See Castille v. Peoples, 489 U.S. 346, 350-51 (1989);
22 James v. Borg, 24 F.3d 20, 24 (9th Cir.), cert. denied, 513 U.S. 935
23 (1994).
24

25 In his petition for review to the California Supreme Court,
26 Petitioner challenged only the lawfulness of the investigative stop
27 and subsequent search which led to the discovery of the marijuana (see
28 Respondent's Lodgment 7). Petitioner did not present to the

1 California Supreme Court the claims raised in the instant Petition.
 2 Therefore, the Petition is completely unexhausted.

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 4 Petitioner still may be able to present his unexhausted claims to
 5 the California Supreme Court. See, e.g., In re Harris, 5 Cal. 4th
 6 813, 825, 21 Cal. Rptr. 2d 373, 855 P.2d 391 (1993) ("[H]abeas Corpus
 7 has become a proper remedy in this state to collaterally attack a
 8 judgment of conviction which has been obtained in violation of
 9 fundamental constitutional rights.") (citations and quotations
 10 omitted); Mendez v. Superior Court, 87 Cal. App. 4th 791, 799, 104
 11 Cal. Rptr. 2d 839 (2001) (claim that conviction was obtained in
 12 violation of fundamental constitutional rights may be raised by state
 13 habeas petition; citation and internal quotations omitted).⁴

14
 15 In certain circumstances, the Court has authority to stay a
 16 "mixed" petition containing both exhausted and unexhausted claims.
 17 See Rhines v. Weber, 544 U.S. 269 (2005); King v. Ryan, 564 F.3d 1133,
 18 1143 (9th Cir.), cert. denied, 130 S. Ct. 214 (2009) (stay procedure
 19 authorized by Kelly v. Small, 315 F.3d 1063 (9th Cir.), cert. denied,
 20 548 U.S. 1042 (2003), overruled on other grounds, Robbins v. Carey,
 21 481 F.3d 1143 (9th Cir. 2007), remains available after Rhines v.

22
 23 ⁴ The Court expresses no opinion concerning whether
 24 consideration of a state habeas petition might be foreclosed by
 25 the principles discussed in In re Clark, 5 Cal. 4th 750, 763-87,
 26 21 Cal. Rptr. 2d 509, 517-34, 855 P.2d 729 (1993). The
 27 California Supreme Court should evaluate this matter in the first
 28 instance. Moreover, even if there exists an applicable state
 procedural bar, the California Supreme Court nevertheless might
 choose to reach the merits of Petitioner's claims. See, e.g.,
Park v. California, 202 F.3d 1146 (9th Cir.), cert. denied, 531
 U.S. 918 (2000).

1 Weber). However, the present Petition is not mixed; it is completely
2 unexhausted. The Court cannot stay a completely unexhausted petition.
3 See Raspberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006) (Rhines
4 stay inappropriate); Jarrar v. Barnes, 2009 WL 2394361, at *1 n.1
5 (E.D. Cal. Aug. 4, 2009) (Kelly stay inappropriate); Tappin v. United
6 States District Court, 2008 WL 686555, at *8 (E.D. Cal. Mar. 11, 2008)
7 (same). Therefore, the Petition must be dismissed without prejudice.
8 See Guillory v. Roe, 329 F.3d 1015, 1017 (9th Cir.), cert. denied, 540
9 U.S. 974 (2003).

10 ORDER

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12 For the foregoing reasons, the Petition is dismissed without
13 prejudice.

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17 DATED: January 20, 2012.

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20 _____/S/_____
21 CHARLES F. EICK
22 UNITED STATES MAGISTRATE JUDGE
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